Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00226/2017

THE IMMIGRATION ACTS

Heard at Stoke	**Decision & Reasons Promulgated**
On 8 November 2017	**On 10 November 2017**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAFAR FARAH
(anonymity direction not made)

Respondent

Representation:
For the Appellant: Mr C Bates Senior Home Office Presenting Officer.
For the Respondent: Mr R Singer - Direct Access Barrister (advocacy only).

ERROR OF LAW FINDING AND REASONS

1. This is an appeal by the Secretary of State against a decision of First-tier Tribunal V A Cox promulgated on 14 August 2017 in which the Judge allowed the appeal against the decision of the Secretary of State to deport Mr Farah from the United Kingdom.

Background

2. Mr Farah is a Dutch national born on 31 August 1998 who claims to have entered the United Kingdom aged two and who has two convictions for a total of four offences.
3. On 6 November 2015 Mr Farah was convicted of (a) using a vehicle whilst uninsured for which the sentence was a six-month referral order, his parents were to attend meetings of a youth offending panel and his driving licence was endorsed, (b) driving otherwise than in accordance with the license for which the sentence was a six-month referral order and driving licence endorsed, and (c) driving a mechanically propelled vehicle without due care and attention for which the sentence was a six-month referral order, £15 victim surcharge, £30 costs and driving licence endorsed with six points.
4. On 22 November 2016 Mr Farah was convicted of Robbery and sentenced to a 2-year detention and training order.
5. The Judge considered the documentary evidence together with oral evidence from Mr Farah, his mother, father and three of his siblings, in addition to the documentary evidence provided by the Secretary of State. The Judge found Mr Farah to be an honest witness and accepted that if deported his family would have to help him as he had no other support in Holland, a position supported by Mr Farah's mother. The Judge found the appellant's father was not realistic in his evidence and sets out some criticism in the decision which is not of importance at this stage in the proceedings.
6. Having considered the evidence and submissions the Judge sets out findings of fact from [32] – [47] which can be summarised in the following terms:

    a. The Secretary of State has not dealt appropriately with Regulation 27. The reasons for refusal letter identifies the appellant as being lawfully resident in the United Kingdom for 11 years and eight months, the majority of which he was a minor and is dependent on his parents [33].
    b. It is not necessary for a qualifying EA citizen to apply for a permanent residence card. The Secretary of State has accepted all other family members are entitled to a residence card and it is not at issue that Mr Farah is the son of the mother and father who appeared before the First-tier Tribunal [34].
    c. Mr Farah was a dependent child who lived with his parents from the time he came to the United Kingdom. At the time of the first offence Mr Farah was plainly living in the UK as his parents were subject to sanctions from the criminal court and required to attend courses as the parents of a dependent child [35].
    d. The Secretary State makes reference in the refusal letter to the absence of evidence of comprehensive sickness insurance for Mr Farah as a dependent child. It was found at the time Mr Farah acquired his right of permanent residence such evidence was not required with dependent children as the respondent plainly

accepted that the regulations were met by the dependent children of the mother and father and there was no satisfactory evidence of any difference between those children, some of whom are older and some younger, than Mr Farah [36].

e. It was found Mr Farah does have a right of permanent residence under Regulation 15 [37].
f. The Tribunal was required to consider whether there are imperative grounds of public security in respect of Mr Farah as he is someone who has resided in the United Kingdom for a continuous period of at least 10 years prior to the decision. It was conceded in the refusal letter. Mr Farah would have automatically qualified for permanent residence in March 2009 and has lived in the UK for a continuous period of at least 10 years before the date of the relevant decision [38].
g. The offence before the Tribunal may be serious but it was necessary to consider Regulation 27(4)(a) and whether there are "imperative grounds of public security" [39].
h. There are fundamental differences between the position of an alien and that of an EEA national and the importance of the Citizenship Directive to protect and support Treaty rights of free movement of nationals of Member States and by extension nationals of other EEA states [40].
i. Other than in the most serious cases, public revulsion and deterrence have little part to play save perhaps in the most exceptional cases. Existence of previous criminal convictions can only be taken into account in respect of whether circumstances constitute a present threat to the requirement of public policy. If found there is a real risk of reoffending and that Mr Farah is likely to act in the same way in the future past conduct alone could constitute a threat to public policy fundamental nature of the principle of free movement and the need to identify a present threat to the requirement to public policy and whether there are imperative grounds for public security which are overwhelming [41].
j. Although Mr Farah's offence is undoubtedly serious it cannot be regarded as of exceptional gravity of the kind of offence that an EA citizen comes within the description of a serious ground of public policy or public security sufficient to justify deportation [42].
k. Imperative grounds of public security is a considerably stricter test than merely serious grounds but I do not find that those hurdles can be surmounted by the Secretary of State in respect of this matter [43].
l. Mr Farah has plainly behaved in a wholly unacceptable way. He was a minor when he committed both the offences and although they are escalating the suggestion that he was led astray by older

people was to be given weight. The Judge hopes that as an adult and having served a significant period of imprisonment Mr Farah understands that such offending is wholly unacceptable [44].

m. Taking into account all the circumstances, the Judge could not find the offences can properly be described as coming within the ambit of serious grounds of public policy and public security in respect of Mr Farah [45].
n. The offending falls short of the imperative grounds of public security that are required in respect of an EEA national who has resided in the United Kingdom for a continuous period of at least 10 years prior to the relevant decision [46].
o. The Secretary of State's decision is not in accordance with the Regulations and that Mr Farah can claim the enhanced protection against deportation as an EEA national [47].
p. It is not necessary to consider the article 8 ECHR issues [48].

7. The Secretary of State sought the permission to appeal to the Upper Tribunal which was granted by another judge of the First-tier Tribunal on 4 September 2017. The operative wording of the grant being in the following terms:

> 3. This appeal hinges on a decision of the respondent made on dated 31 March 2017 which means the judge had to consider the 2016 -17 EEA Regulations in reaching his decision.
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> 4. Even though I find the judge was correct in considering the 2006 EEA regulations in his findings that the appellant had acquired 10 years of permanent residence, having been resident in the United Kingdom since the age of two years old, it is arguable that his decision fell into error because he appears not to have considered regulation 27(8) of the 2016 EEA Regulations, which requires a court or tribunal to have regard to schedule 1 (consideration of public policy, public security and the fundamental interests of society, etc) when considering appeals and other litigation relating to EA removal decisions (which included deportation appeals). Permission to appeal is granted.

Preliminary issue

8. At the commencement of the hearing it was necessary to discuss whether the grant of permission was a limited grant or not. On behalf of the Secretary of State Mr Bates argued that the final sentence at the end of paragraph 4 that "permission to appeal is granted" indicated that permission had been granted to the Secretary of State on all the grounds on which permission to appeal was sought. Mr Singer indicated that his reading of paragraph 4 was that the Secretary of State had been refused permission to appeal in relation to the challenge to the finding that the appellant had acquired 10 years permanent residence and that permission had only been granted in relation to the failure to consider the 2016 EEA Regulations.
9. The exact wording of paragraph 4 is set out above. In that, First-tier Tribunal Judge O'Garro expressly states that in his opinion the Judge was correct in

finding the appellant had acquired 10 years of permanent residence. This is not a finding that it was arguable that the Judge had made any form of legal error in relation to this aspect, resulting in an indication from the Bench to the parties that the grant is a limited grant by reference to the 2016 Regulations only.

10. Mr Bates was therefore provided with two options which was either to accept the limited grant of permission in its terms or for the matter to be put off to enable the correct notices to be served upon the Secretary of State advising her that only a limited grant of permission had been made and providing her with the opportunity to consider whether she wished to renew an application for permission to appeal in relation to those aspects for which permission was not granted to the Upper Tribunal.

11. Mr Bates canvassed a further option by enquiring whether the Upper Tribunal would enable him to make an oral application for permission to appeal on those grounds in relation to which the First-tier Tribunal had refused permission. The Upper Tribunal accepted that it was possible for such an application to be made subject to two aspects of procedural fairness which were, firstly, that as I had already indicated in the earlier part of the decision that the grant was limited to the 2016 Regulations only, the fact this may indicate to some that this was the view of the Upper Tribunal, which Mr Bates accepted but also accepted he would be given a fair hearing of any oral application and, secondly, the issue of whether Mr Singer would be in any way prejudiced as ordinarily he will be aware of the terms of any grant of permission to appeal before any hearing date to allow him to prepare his arguments in relation to the same. Mr Singer confirmed that he had no concerns in relation to that matter and indicated he will be ready to proceed in any event.

12. Mr Bates was therefore able to make oral submissions on behalf of the Secretary of State as to why permission to appeal should be granted in relation to a challenge to the finding of the Judge that the appellant had acquired permanent residence in the United Kingdom and lived here for the requisite 10-year period entitling him to the highest level of protection.

13. The original basis on which this was pleaded in the application for permission to appeal referred to the requirements to be met by a student in the United Kingdom. Mr Bates did not pursue this matter, quite properly, and it appears that the grounds advanced by whoever prepared the original grounds of appeal on behalf the Secretary of State may have issued a challenge on the wrong basis.

14. The thrust of Mr Bates submissions was that the conclusion by the Judge that the appellant had obtained permanent residence in 2009 was not adequately reasoned and that the evidence before the Judge on which this decision was made was not clear in relation to either the oral or documentary evidence regarding the appellant's father exercising treaty rights. The Judge had found aspects of the appellant's father's evidence not to be reliable and there was little evidence for the relevant period regarding the nature of the treaty rights the appellant's father was said to be exercising. There was, for example, in a letter from St Georges little evidence of the details of employment or remuneration received. As the status of the appellant's family members was relevant and material to the status and findings relating to the appellant, it was argued the

Judge failed to adequately reason or to show that permanent residence had been secured.

15. It was also argued by Mr Bates that it was a requirement according to case law for status of permanent residence to be determined as a prerequisite and that as the Judge's conclusions in relation to this aspect are flawed permission should be granted.
16. Whilst the letter referred to by Mr Bates is arguably limited Mr Singer noted that there had been a grant of permanent residence to other family members based upon the evidence of the family circumstances and that the Judge had found the evidence of the appellant and other family members to be credible. It was argued the Secretary of State's advocate at the First-tier hearing did not dispute the appellant's father's position and had not raise the points made by Mr Bates in challenge today. The Judge had found that the necessary five years had been satisfied such that a right of permanent residence had been accrued.
17. It was noted the appellant had been in the United Kingdom since he was two and lived with his parents who have been granted status in the United Kingdom.
18. Mr Bates in response stated there had been no concession at [22] and that the conclusion in relation to status was left to the Judge and, on the evidence, he questioned whether the Judge had adequately reasoned those findings.
19. The application for permission to challenge the finding in relation to the appellant having permanent residence and an entitlement to the highest level of protection was refused. Mr Bates had failed to establish realistic prospects of success or arguable legal error, the matters on which he made his application are not those originally before the First-tier Tribunal when seeking permission to appeal although Mr Bates argued that an application to amend was not required as the core aspect, findings in relation to status, were pleaded.
20. In light of the failure to establish any arguable legal error material to the decision to dismiss the appeal and the refusal of permission, the case proceeded on the basis of the limited grant of permission set out above.

Error of law

21. In relation to the 2016 Regulations, Mr Bates submitted that in light of the fact the appellant having acquired permanent residence had been made out, and that the relevant ground was the imperative ground of protection, it was necessary to consider Schedule 1 and Regulation 27 of the 2016 EEA regulations.
22. It was submitted the Judge erred in law in not considering whether, even though the applicant had acquired the imperative ground, there had been a break in his period of integration in the United Kingdom such that the level of protection was not at the highest level. It was submitted that at [44] in which the Judge finds:

> 44. The Appellant has plainly behaved in a wholly unacceptable way. He was a minor when he committed both of the offences and although they are escalating and I find his suggestion, sadly supported by his family, that he was led astray by older people to be of little weight. It is to be hoped that now as an adult and having

> served a significant period of imprisonment he would understand that such offending is wholly unacceptable and that he has let both himself and his family down.

is speculation for if the Mr Farah had not learned his lesson it could not be said he was integrated and that a real risk arises.

23. Mr Bates submitted that case law relating to 'imperative grounds' shows the threshold is not fixed in time and that when assessing integration, the Judge failed to consider all relevant factors before concluding the requisite 10 years have been satisfied bring into play the 10-year policy.
24. It was submitted that the offending was serious and the Judge needed to have regard to the use of rehabilitation and issue of further ongoing offending in addition to placing reliance upon the pleaded grounds.
25. Mr Singer sought to rely upon his Rule 24 response in which he asserted there was no material error made by the Judge and that in reality the challenge by the Secretary State amounted to little more than a reasons challenge. It is argued the conclusion the appellant had accrued permanent residence and lived in the United Kingdom for more than 10 years is a sustainable finding and that no arguable legal error had been made out.
26. It is noted the issue of Schedule 1 to the 2016 regulations was raised in the skeleton argument before the Judge who also accepted the credibility of the evidence which the Judge was provided.
27. This is also a case of an individual EEA national committing offences in the United Kingdom prior to attaining adulthood which is a relevant issue when considering the law relating to deportation.
28. The Upper Tribunal accepts the submission that the Judge may have set out the findings made in a more structured manner reflecting the provisions of the Schedule relied upon by the Secretary of State which may assist have assisted a reader and, as noted at the hearing, if this had happened it may be this matter would never have got as far as it did.
29. The evidence does not support a conclusion that Mr Farah's integration into the United Kingdom, which he clearly had acquired having entered at the age of two and now being an adult, was disrupted to any material degree as a result of his criminal conduct. Commission of crimes does not automatically have the effect of taking away from an individual previously acquired integration although is a relevant factor. The Judge was fully aware of the fact Mr Farah had spent his formative years in the United Kingdom but does not find that the ties he has formed have been lost. This is the basis of the finding of entitlement to the higher degree of protection.
30. The Judge notes that as the higher degree of protection has been acquired and is enjoyed by Mr Farah it was necessary for the Secretary of State to establish imperative grounds of public policy or public security. The conclusion the higher level of imperative grounds is engaged has not been shown to be a finding not within the range of those available to the Judge on the basis of the evidence provided to the First-tier Tribunal.
31. It matters not whether another judge of that tribunal or indeed the Upper Tribunal would make the same decision, or not, as that is not the relevant test.

On the basis of the information made available it has not been made out that the conclusions are in any way arguably perverse or irrational or fall outside the range of findings the Judge was entitled to make when considering the facts and applicable law relating to this appeal.

32. At the conclusion of the hearing, when the decision was formerly reserved, Mr Farah was advised that if this finding goes in his favour he must ensure that he commits no further offences in the future. Mr Farah is now an adult and, like most EEA nationals, faces uncertainty into relation to what may occur if the United Kingdom leaves the European Union as a result of the Brexit vote. It has long been understood that a person who is an EU citizen who has acquired rights in the United Kingdom is more difficult to remove as a result of acts of criminality than a person who is not an EEA national who is removed pursuant to the U.K.s domestic legislation relating to the deportation of foreign criminals. If Mr Farah wishes to remain in the United Kingdom, and not disappoint or let down his parents any further, he will ensure that he will not come to the attention of the criminal courts or the Secretary of State on any future occasion.

33. As no arguable legal error material to the decision to allow the appeal has been made out the Secretary States application is dismissed.

Decision

34. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

35. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed…….
Judge of the Upper Tribunal Hanson

Dated the 9 November 2017